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In The

Supreme Court of the United States

October Term, 1980

JOHN TARPEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MICHAEL ROSEN
SAXE, BACON & BOLAN, P.C.
Attorneys for Petitioner
39 East 68th Street
New York, New York 10021
(212) 472-1400

4834 LUTZ APPELLATE PRINTERS, INC.
NY (212) 840-9494 • (516) 222-1606 • (914) 683-9363
NJ (201) 257-6850 • PA (215) 563-5587 • DC (202) 783-7288 • MA (617) 227-1133

QUESTIONS PRESENTED

1. Was there probable cause to detain and arrest petitioner?

2. Did Agent Colgan's initial entry into petitioner's car violate petitioner's Fourth Amendment rights?

3. Should the documents seized from petitioner's car have been suppressed?

PARTIES

The parties in the district court were as follows:

United States of America

vs.

John Tarpey, John Cerverizzo, Robert Peppaceno, Edward Karnefsky and Malben Buchwald.

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No.

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October Term, 1980

JOHN TARPEY,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner John Tarpey respectfully prays that a writ of certiorari issue to review the judgment entered in this proceeding on August 20, 1980, by the United States Court of Appeals for the Second Circuit. A petition for rehearing was denied February 25, 1981.

OPINION BELOW

The opinion by the Second Circuit is reprinted in the appendix hereto.

JURISDICTION

The Second Circuit on August 20, 1980, affirmed a judgment of conviction entered on February 22, 1980 in the Eastern District of New York. The petitioner had been convicted, after a jury trial, of possession of property stolen from an interstate shipment and conspiracy to do so in violation of 18 U.S.C. §§371, 659 and 2. A petition for rehearing was denied on February 25, 1981.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

I. The Proceedings Below

On July 11, 1979, the petitioner was indicted on two counts for possession of approximately 399 cartons of merchandise stolen from an interstate shipment and conspiracy to receive and possess same in violation of 18 U.S.C. §§371, 659 and 2. Pre-trial suppression hearings were held in November 1979. The District Court denied petitioner's motion to suppress evidence seized from his automobile. A six day jury trial took place in November and December 1979. Petitioner was found guilty as charged. On February 22, 1980, petitioner was sentenced to five years imprisonment and a $10,000 fine. The judgment of conviction was affirmed by the Second Circuit on the appeal. A petition for rehearing was denied.

II. The Evidence at Trial

A. Background

On or about May 13, 1978, an interstate shipment of

various merchandise,[1] consisting of 946 crates and cartons, consigned to Maas Brothers Department Store (hereinafter "Maas Brothers") in Tampa, Florida, was stolen in Secaucus, New Jersey (T104).[2] The merchandise was being transported as a "consolidated" shipment by Q.T. Consolidated Inc. (hereinafter "Consolidated").[3] On May 16, 1978, Consolidated's truck, sans cartons, was found abandoned.

B. May 17, 1978

By 8:00 a.m., FBI agents had tracked down a portion of the stolen Maas Brothers' shipment to a truck yard located on Alabama Avenue, Brooklyn. Agents John J. Kuhn, Richard P. Mika and others observed two trailers "back to back" in the yard containing cartons with the name "Maas Brothers" on them (T110, 112, 114, 115; H10, 15, 17). Also observed were co-defendants John Cerverizzo, Robert Peppaceno and Edward Karnefsky (hereinafter "Karnefsky") loading the Maas Brothers' cartons into a yellow truck and a green van (T112-114; H7, 16).

Karnefsky, a heavy set 300 pound man wearing a plaid shirt, left the yard with the loaded green van and drove to Tenth Avenue, Brooklyn, to a house where a woman named Delores Morrow lived. The cartons were transferred into a garage (T122-124; H17).

Peppaceno and Cerverizzo left the yard at Alabama Avenue in the loaded yellow truck and drove to Tina's Stationery Store

1. Ladies' dresses, cosmetics, glassware, bathroom scales and other items.

2. "T" references are to the trial transcript; "H" references are to the pre-trial suppression hearing.

3. When goods are shipped via a "consolidated" shipment, various vendors deliver the merchandise to the carrier, who delivers them to the consignee.

on Eighth Avenue, Brooklyn, where approximately 60 of the stolen cartons were deposited. Tina's Stationery Store is owned by co-defendant Malben Buchwald. Peppaceno and Cerverizzo were arrested at Tina's (T305).

Karnefsky, meanwhile, drove back to the truck yard at Alabama Avenue to load up again. After loading, Karnefsky, in his green van, drove down Pennsylvania Avenue followed by Agents Kuhn and Mika, each in his own car.[4]

C. Enter Tarpey

As Agent Kuhn was following Karnefsky he noticed Tarpey, in a grey Ford LTD, weaving through the traffic. The traffic signal at Pennsylvania Avenue and Linden Boulevard turned red and Karnefsky, in the left lane of the southbound flow of traffic, stopped. Tarpey, in the right-hand lane, two or three car lengths from the light, also stopped. Tarpey left his vehicle and walked over to Karnefsky in the green van. Tarpey talked to Karnefsky for about 15 seconds, pointed southward, and then walked back to his car. Tarpey's conversation was not overheard (T408).

When the traffic light turned green, Karnefsky fell in behind Tarpey and they proceeded in tandem to 57th Street, Brooklyn. This was in the direction of Rapid Vending Corp., Tarpey's employer (T724).

[Carl Koren testified that he is the owner of Rapid Vending Corp., operators of candy and cigarette vending machines placed in various locations throughout the city, including the United States Coast Guard Station at Governors Island, New York. Tarpey is employed by Rapid Vending Corp. as its general

4. The time now was approximately 4:00 p.m.

manager and his duties include servicing and collecting the money from certain designated machines (T720, 725). Koren testified that on May 17, Tarpey had serviced eleven machines at the Coast Guard Station and had collected $1,200 in nickels, dimes and quarters, which were placed in money bags — each one representing a particular machine (T727-728, 730).

Koren testified further that Karnefsky owned "Quick-As-A-Wink Car Service" in Brooklyn and was a customer of Rapid Vending, in that one or more machines were located in Karnefsky's place of business. Koren stated that Karnefsky owed money to Rapid Vending Corp. and that "if we ran into him we'd like to talk to him" (T726-727).]

D. 57th Street, 4:15 P.M.

Tarpey made a left-hand turn from Flatlands Avenue on to 57th Street, followed by Karnefsky in the green van. Tarpey pulled up along the curb, parked his car legally, emerged from the car and was walking on the sidewalk towards a friend's building (T433; H53). Karnefsky double-parked the green van slightly behind Tarpey's car. No words were spoken between the two men (T411). It was 4:15 p.m. and the trailing agents moved in.

Agent Mika pulled his car in front of Tarpey's vehicle, Agent Kuhn pulled in behind Karnefsky's van, blocking them from moving (T411). Mika stopped Tarpey as he was walking on the sidewalk away from the van (T411). Kuhn approached Karnefsky.

Agent Mika asked Tarpey to identify himself, which Tarpey did. Mika advised Tarpey that he was being "detained" to determine whether there was stolen property in Karnefsky's van.

Mika advised Tarpey of his constitutional rights (H30). Mika asked Tarpey "what his relationship was [to Karnefsky]" (H31). Tarpey replied that he knew Karnefsky, who was following him to Rapid Vending Corp. (H31).

Although Mika told Tarpey that he was being detained "to determine whether there was stolen property in Karnefsky's van," Mika had personally observed Karnefsky depart the truck yard on Alabama Avenue in the green van prior to the trip on Pennsylvania Avenue and recognized the 300 pound Karnefsky as an obvious person and easy to spot (T402-403). Actually Mika, at approximately 11:45 a.m. was on surveillance at the truck yard and saw Karnefsky taking stolen cartons off the trailers and loading them on the green van (T406). He even saw names on the cartons (T406).

Mika testified that Tarpey's "detention" at 4:15 p.m. was not an arrest. He stated that the agents used the next *three hours* to determine whether the property on Karnefsky's van was stolen before deciding at 7:15 p.m. to formally advise Tarpey he was under arrest (T418; H41-42). Agent Kuhn testified, however, that after Tarpey had been "detained" he was not free to leave (H155) and that it did not take three hours to determine that the merchandise was stolen (T488-489). *Agent Kuhn testified, that the several hours were spent trying to figure out what, if anything, Tarpey would be charged with* (T508; H131).

E. 57th Street, 4:15 P.M. to 7:15 P.M.

After Tarpey and Karnefsky had been detained, Agent Kuhn spent the better part of the next three hours on the telephone in a booth across the street from Agent Mika and their detainees (H88).

Mika testified that for the next three hours Tarpey was either standing in the area, sitting in Mika's car or sitting in his own car (T393, 434-435). Tarpey was in Mika's car from 4:15 p.m. to 5:30 p.m. During this period, Tarpey had the keys to his vehicle on his person (T432). At approximately 5:30 p.m., Tarpey voluntarily opened the trunk of his car to allow an inspection by Mika (T430). No contraband was found and Mika testified that he had no reason to believe there was any contraband in the car (T438).

After opening the trunk, Tarpey was allowed to sit in his own vehicle and, according to Mika, the keys thereto were taken by him from Tarpey so that Tarpey would not escape (T434).

Notwithstanding Mika's concession that it is an FBI cardinal rule and normal procedure to look into a car where a detainee or arrestee is in his car (to be certain there are no secreted weapons or spare sets of keys), he testified that he did not look into Tarpey's car (T434-435).

F. Enter FBI Agent Patrick Colgan

Mika testified that Kuhn had called Patrick Colgan, an FBI agent experienced in "hijack type cases," to the scene for assistance (H59-60). Colgan knew Tarpey in 1972 when he participated in an arrest of Tarpey (H140-141). Mika testified that Colgan arrived at 6:50 p.m. just before the decision to arrest Tarpey was made (T421; H63). Colgan testified that he arrived between 5:30 p.m. and 5:45 p.m. (T540; H140). Colgan "arrested" Tarpey at 7:15 p.m. (H92, 116).

Tarpey was told that he was being taken to FBI Headquarters in Manhattan (H70).[5] Mika testified that Tarpey

5. At FBI Headquarters, Tarpey was searched and a personal telephone directory was seized (T397; H36).

expressed concern for his vehicle because there were important keys in the trunk (T395-396; H70). According to Mika, Tarpey said he would park his vehicle in his friend's parking lot on the block (T396; H35). Mika testified that he told Tarpey that he was under arrest and could not drive his car, but that he, Mika, would move the car; that Tarpey said "OK" (T396; H35) and turned over his car keys to Mika (T436),[6] who gave them to Colgan (H35).

Mika later conceded however, that Tarpey *never asked him or any agent* to move his car (T425; H70). Kuhn, however, in an affidavit submitted to the United States Magistrate in support of a search warrant of Tarpey's vehicle, stated:

> "Following Mr. Tarpey's arrest, he gave the keys to [his vehicle] to a Special Agent and *asked the agent to move the car to a nearby lot*" (A61a).[7] (Emphasis added.)

Colgan testified that when he arrived on the scene he spoke to Tarpey, who was seated in his car (H141). Colgan then contacted his supervisor from the telephone booth across the street and requested "an opinion as to the arrest of Karnefsky and Tarpey" from the U.S. Attorney's Office (H141-143). Authorization for the arrests was given.

Colgan stated that Tarpey and Mika were discussing securing Tarpey's car (H141). Colgan testified (H144):

> "I entered the conversation by asking Mr. Tarpey if it would be possible to contact a person in the

6. Mika, however, testified that *after* 5:30 p.m. he *had* Tarpey's keys (T434).

7. Reference is to Tarpey's Appendix on Appeal.

> nearby building on East 57th Street, *a person that had contacted Mr. Tarpey* during the time that I was there on East 57th Street and to see if this person would perhaps be willing to secure this car for [Tarpey] . . . since he was to go to the New York office for processing" (H144-145). (Emphasis added.)

According to Colgan, Tarpey said a person named Ralphy might be able to take care of the car. Tarpey and Colgan walked into the nearby building and a conversation with Ralphy ensued (T543-544). Colgan heard Tarpey tell Ralphy that the agents would shortly "turn over the *car and the keys*" and ask Ralphy if he would secure the car for the night, to which Ralphy said he would (H145). (Emphasis added.) Colgan stated that he and Tarpey left the building and Colgan received Tarpey's car keys from Mika (H145).

Tarpey testified at the suppression hearing that Colgan had asked him about securing his vehicle. Tarpey then spoke to Ralphy. However, an individual named Lennie Insalaco, who was in the same business as Tarpey and worked out of the same office, was also at East 57th Street and Tarpey arranged for Insalaco to take the car back to the office since there was money from vending machine collections in the trunk (H192-193). Tarpey attempted to give Insalaco the car keys but Colgan took them, telling Insalaco to go into the nearby building (H193). Tarpey testified that he did not give consent to any agents either to enter or move his car (H190).

Insalaco testified that he was in the vending machine business and works out of the same office as Tarpey, although not associated with him (H167-168). Insalaco's uncle owns the building on East 57th Street and is a friend of Ralphy, who operates a business therein (H169). He testified further that

Tarpey wanted him to have the keys to his car and as Tarpey was handing them over, an agent took them away (H171). Tarpey wanted Insalaco to take the car to their joint office (H172).

Insalaco stated that the agent told him to wait and would give him "*the car and the keys*" after obtaining a release (H172). (Emphasis added.) Insalaco waited, but saw the car driven away (H173).

G. Events Subsequent to the Arrest

Tarpey and Karnefsky were driven away from East 57th Street by Mika, alone, in his Bureau car.[8] Kuhn drove Karnefsky's green van. Colgan remained on East 57th Street with Tarpey's keys and car (T445).

Colgan then entered Tarpey's vehicle. He testified at the suppression hearing (H147):

> "[A]s I pulled out of the parking spot, I applied the brakes, papers slipped out from the front passenger seat and I looked down from [sic] the papers and on top was a [Maas Brothers invoice] . . . I was pulling out of the parking spot. There was a vehicle in front of me[9] and I just applied the brakes because there was a vehicle at this time coming by me."

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8. It was Colgan's decision that a single agent drive both arrestees (T559), notwithstanding the prudent FBI policy against one agent and two suspects in one car (T443).

9. When Mika left with his arrestees in his car there was no vehicle any longer in front of Tarpey's car (T438).

Colgan stated further that prior to the papers sliding "out from under the right front passenger seat of Mr. Tarpey's car" he had not been aware of their presence (H148). Colgan then drove Tarpey's vehicle to a telephone booth and requested a tow truck to remove the car to a government facility (H149).

H. May 18, 1978

At approximately 6:00 p.m.[10] Tarpey was brought before the Magistrate to fix bail and was released. Also at 6:00 p.m. Agent Kuhn swore to the truth of his affidavit in support of search warrants for, among other things, authorization to search Tarpey's car (T499-500; H122-123). That day Colgan had told Kuhn of his activities relating to Tarpey's car the night before (H149). Colgan did not tell Kuhn that "*when he entered* [*Tarpey's*] *vehicle* [*he*] *observed numerous papers in the car, among them in plain view on the seat was* [*a Maas Brothers*] *bill of lading . . .*" (H150). (Emphasis added.) That was not true (H151).

Agent Kuhn's affidavit in support of the warrant stated (paragraph 22):

> "When the agent entered the vehicle, he observed numerous papers in the car. *Among them in plain view on the seat was a* [*Maas Brothers*] *bill of lading . . .*" (A61a). (Emphasis added.)

The warrant was issued.

Kuhn was examined about the statement in his affidavit that "among [the papers] in plain view on the seat was a bill of lading with the name Maas Brothers on it":

10. Twenty-five hours and forty-five minutes after he was "detained" on 57th Street.

"Q. Was that true? A. No.

Q. You knew that was false when you swore to it before the Judge, isn't that a fact? A. I knew that was not true when I swore to the affidavit." (T501).[11]

I. May 19, 1978

Agents Kuhn and Colgan, armed with the search warrant, searched Tarpey's car (T474-475, 555). Agent Kuhn said they seized 265 shipping documents, *i.e., invoices* and packing slips found under the driver's seat and under the passenger seat (T478). It was not contested by petitioner Tarpey that the documents related to the stolen Maas Brothers shipment. The documents were admitted against Tarpey at trial. Tarpey's counsel argued to the jury that the evidence demonstrates that those documents could not have been in the car. The jury, however, convicted Tarpey.

REASONS FOR GRANTING THE WRIT

Petitioner maintains that at each of the three critical stages leading up to the "discovery" of the 265 shipping documents, his constitutional rights were violated. It will be demonstrated below that the agents had no probable cause to arrest Tarpey at 4:15 p.m. or at 7:15 p.m. on May 17, 1978. It will also be shown that Agent Colgan's entry into Tarpey's vehicle was unauthorized and illegal. Finally, the documents allegedly seized from Tarpey's car pursuant to the search warrant, should have

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11. At the hearing Kuhn testified that he participated in the drafting of his affidavit, read paragraph 22 of that affidavit and knew it was not true (H121-122).

been suppressed on the grounds that the underlying affidavit, which secured the warrant, was sworn to by the agent knowing that the most material statement contained therein was false.

I.

There was no probable cause to arrest petitioner.

In *Dunaway v. New York*, 442 U.S. 200, ___ S. Ct. ___, 60 L. Ed. 2d 824 (1979), the United States Supreme Court issued its most recent pronouncement regarding the necessity for authorities having probable cause prior to arresting or detaining individuals. Mr. Justice Brennan, writing for the Court, stated:

> "Hostility to seizures based on mere suspicion was a prime motivation for the adoption of the Fourth Amendment, and decisions immediately after its adoption affirmed that 'common rumor or report, suspicion,' or even 'strong reason to suspect' was not adequate to support a warrant for arrest. See *Henry v. United States*, 361 U.S. 98, 100, 4 L. Ed. 2d 134, 80 S. Ct. 168 (1959); *Brinegar v. United States*, 338 U.S. 160 (1949)."

The Court held in no uncertain terms that the treatment of a citizen, whether or not it is technically characterized as an arrest or as a detention "must be supported by probable cause." 60 L. Ed. 2d at 837. Indeed, while the Court held that a police officer may *briefly* stop a citizen and inquire about his status and may even ask him to explain suspicious circumstances, any further detention or search must be based on consent or probable cause. *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S. Ct. 2574, 45 L. Ed. 2d 607 (1974).

In *Dunaway*, the defendant (1) was detained by law enforcement authorities, (2) was not told he was free to go, (3) would have been restrained had he attempted to leave, and (4) made certain statements which were later utilized against him at the trial.

The State of New York, notwithstanding its concession that the police lacked probable cause to arrest Dunaway, maintained, nevertheless, that the seizure of Dunaway did not amount to an arrest and was therefore permissible under the Fourth Amendment because the police had a "reasonable suspicion" that the petitioner possessed intimate knowledge about a serious and unsolved crime.

The Supreme Court disagreed, holding that the standard of probable cause represented the accumulated wisdom of precedent and experience as to the minimum justification necessary to make the kind of intrusion involved in an arrest "reasonable" under the Fourth Amendment.

In *Davis v. Mississippi*, 394 U.S. 721, 22 L. Ed. 2d 676, 89 S. Ct. 1394 (1969), the High Court warned:

> "To argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment. Investigatory seizure would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusion upon the personal security of our citizens whether these intrusions be termed 'arrests' or 'investigatory detentions'." 394 U.S. at 726-727.

In *Brown v. Illinois*, 422 U.S. 590, 45 L. Ed. 2d 416, 95 S. Ct. 2254 (1975), the Supreme Court again reiterated that arrests made for "investigatory seizures" are disapproved when made on less than probable cause, stating:

> "The impropriety of the arrest was obvious; awareness of the facts were virtually conceded by the two detectives when they repeatedly acknowledged, in their testimony, that the purpose of their actions was 'for investigation' or for 'questioning' . . . The arrest, both in design and in execution was investigatory. The detectives embarked upon this expedition for evidence in the hope that something might turn up." *Ibid.* at 422 U.S. 605.

The Court in *Dunaway* recognized:

> "These passages from *Davis* and *Brown* reflect the conclusion that detention for custodial interrogation — regardless of its label — intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest." 60 L. Ed. 2d at 838.

The court below found that from the

> "sequence of events and the presence of the stolen cartons in Karnefsky's van, the agents had reasonable ground to believe that Tarpey was directing the delivery of the cartons or was

> otherwise connected with their distribution. Thus, probable cause existed for his arrest."[12]

Even accepting every favorable inference in favor of the Government we respectfully submit that the "sequence of events" does not reasonably lead to the conclusion found by the court below. Does a citizen create probable cause for an arrest when he encounters an acquaintance who may be carrying stolen goods? If Tarpey had not been "weaving" in traffic, but "sedately" arrived at the traffic light the same time as Karnefsky, would he still be creating probable cause against himself? Should we all refrain from following an acquaintance in a vehicle lest we rouse the suspicions of undercover agents trailing behind? Cannot two acquaintances travel in tandem together to a designated location without being arrested?

Tarpey did not have contraband in his car when he was "detained," Karnefsky did. Tarpey did not deny knowing Karnefsky and travelling together with him. It was Karnefsky who denied knowing Tarpey. Why draw negative inferences against Tarpey?

At the most, the agents were suspicious. But what *facts* linked Tarpey to the crimes charged — facts which were "sufficient to warrant a prudent man in believing [Tarpey] had committed an offense?" *Beck v. Ohio*, 379 U.S. 89, 91 (1964); *United States ex rel. LaBelle v. La Vallee*, 517 F. 2d 750, 753 (2d Cir. 1975). We respectfully submit there were no such facts available to the agents at the moment of arrest — whether it be 4:15 p.m. or 7:15 p.m.

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12. The court below was in error in finding that at the end of their journey to 57th Street "both men [Karnefsky and Tarpey] left their vehicles." The record demonstrates (T433; H53) that Tarpey had parked his vehicle at the curb, emerged from the vehicle and was walking away from Karnefsky when detained. Karnefsky remained in his double-parked van.

We respectfully submit that the court below overlooked the dictates and teachings of *Dunaway*, *Davis* and *Brown*, *supra*, in validating the detention-arrest here.

The most significant testimony in this record on what was really in the minds of the agents during the three hours on 57th Street is that of Agent Kuhn, who testified that *the several hours were spent trying to figure out what, if anything, Tarpey would be charged with* (T508; H131). The opinion of the court below makes no reference to this critical evidence.

II.

The agent's entry into petitioner's vehicle was unauthorized and illegal.

We concede that Tarpey was concerned about the security of his vehicle since it contained approximately $1,200 in coins which he had obtained by servicing vending machines earlier that day. The Government argued in the District Court that Tarpey consented to the agent's entry into the car to move it to a nearby parking lot for the night. Neither the District Court nor the court below found that Tarpey had consented. The court below, however, found that Colgan's purpose in entering Tarpey's car "was to secure the car, not to search it" thus making the entry non-violative of Tarpey's Fourth Amendment rights.

The Court cited *United States ex rel. LaBelle v. La Valle*, 517 F. 2d 750, 755 (2d Cir. 1975) in support of its holding that Colgan's initial intrusion into Tarpey's car was lawful. We agree with the holding in *LaBelle* that:

> "It is equally clear that incriminating evidence inadvertently coming into plain view *pursuant to*

> *an initial lawful* intrusion is subject to seizure." (Emphasis added.)

However, we respectfully take issue with the Circuit Court's finding that Colgan's initial intrusion was lawful because Colgan's purpose was to "secure" the car and not to search it. Facts justifying the intrusion in *LaBelle* are not present in this case.

In *LaBelle*, the car, with bald tires, came to a stop on a steep incline on an icy road in the center of a traffic lane. The police checking to see that the brake was on was, indeed, a "simple and necessary safety precaution." (517 F. 2d at 755). Here, there is not even a suggestion that Tarpey's car posed any hazard whatsoever. The agent's sole justification to invoke "securing" the car under the "community caretaking function" was the presence of money and keys in Tarpey's trunk. Yet, the Circuit Court completely overlooked the Government's concessions, the record and the controlling law on this critical issue.

The Government acknowledges[12a] that following Tarpey's arrest he "sought permission to move the car" into his friend's lot (Government Brief, p. 26). Agent Mika testified at the suppression hearing and at trial that Tarpey never asked any agent to move his car (T425; H70). The Government in its brief (p. 27), concedes that:

> "Tarpey and Colgan then walked into the building and spoke with Ralphy. Tarpey asked Ralphy to *secure* the car for the night and

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12a. At the Second Circuit.

explained that *the agents would turn over the car and the keys* in the near future." (Emphasis added.)

It is important to note that at this point Tarpey's friend Ralphy was to "secure" the car and would be given the car *and* the keys for that purpose. Significantly, Ralphy was not to get the keys alone — after Colgan supposedly moved the car — but he was to get the car *and* keys for the purpose of securing the car.

In *Cady v. Dombrowski*, 413 U.S. 433, 37 L. Ed. 2d 706, 93 S. Ct. 2523 (1973), the defendant, a Chicago policeman, had a one car accident while driving his vehicle. The police towed the car to a garage seven miles from a police station, where it was left unguarded outside. The defendant was arrested for drunken driving. The next day a police officer looking for the defendant's service revolver made a warrantless search of the car and found several items in the trunk which were later introduced at the defendant's trial for murder, in which he was convicted. The United States Supreme Court held that the search of the car was not unreasonable since the police had exercised a form of custody of the car *which constituted a hazard on the highway, and the disposition of which was precluded by the occupant's intoxicated and later comatose condition.* The Court held that the search for the revolver was standard police procedure to protect the public from a weapon possibly falling into improper hands. The Court specifically noted that due to the defendant's intoxicated condition he "*could not make arrangements to have the vehicle towed and stored*" 413 U.S. at 443 (emphasis added). The vehicle, which had been in an accident, was incapacitated.

Similarly, Mr. Justice Powell concurring in the majority opinion in *South Dakota v. Opperman*, 428 U.S. 364, 49 L. Ed. 2d 1000, 96 S. Ct. 3092 (1976), refers to the fact that in

Opperman the owner of a vehicle illegally parked and subject to impoundment "*was not present to make other arrangements for the safekeeping of his belongings.*" 49 L. Ed. 2d at 1009. (Emphasis added.)

In addition, various state appellate courts have had the opportunity to pass upon the "community caretaking function" of law enforcement authorities. In *State v. Slockbower*, 397 A. 2d 1050 (1979), the New Jersey Supreme Court stated:

> "It has been persuasively stated in a number of cases, in seeking a rationale that would duly balance the right of privacy against legitimate police safekeeping functions, that if the circumstances that bring a vehicle properly to the attention of the police are such that *a driver even though arrested is able to make his own arrangements for its custody* or if the vehicle can be conveniently parked and locked without constituting an obstruction of traffic or other public danger, *the police should permit that action to be taken* rather than impound it against the will of the driver and thereafter search it routinely." 397 A. 2d at 1053-4. (Emphasis added.)

Judge Schreiber, in concurring, stated that there are four situations which would justify an entry into a vehicle once its owner or operator is arrested. He stated that:

> "Only when the vehicle, if not removed, poses a danger to other persons, property or the public safety does there exist a 'substantial police need' justifying impounding *if the driver is unable to arrange for a third party to provide for the*

vehicle's removal." 397 A. 2d at 75, 1057. (Emphasis added.)

In *State of Kansas v. Urban*, 595 P. 2d 352 (1979), the court found that the initial intrusion into a vehicle which afforded the authorities "plain view" of incriminating evidence was not lawful. The court held that in order for the plain view exception to the warrant requirement to apply it must be shown that initial intrusion which afforded authorities the plain view, was lawful. In *Urban*, the defendant's vehicle was impounded for safekeeping subsequent to a legal arrest. The state contended that there was a need for police custodial care in order to protect the property of the defendant. The Court recognized, among other factors, that a car should not be intruded into by the authorities when the driver or owner has the capacity to decide which steps should be taken to deal with his property. The Court noted that the defendant had a friend who was in a position to protect the vehicle.

It is respectfully submitted that the court below misapplied the holding in *La Belle, supra*, and overlooked the holdings in the community caretaking cases which have been cited above. Since Tarpey had made adequate arrangements for the security of his vehicle and its contents with two individuals, Agent Colgan's initial intrusion into the vehicle was unlawful and constituted a violation of Tarpey's Fourth Amendment rights.

III.

The affidavit in support of the search warrant for Tarpey's car, having knowing, material false statements contained therein, is invalid and a nullity as a matter of law and mandates the suppression of any documents seized pursuant thereto.

It is clear from the record that the following day after Tarpey's arrest (May 18) Agent Colgan told Agent Kuhn of his activities relating to Tarpey's car the previous night (H149). Agent Colgan *did not* tell Agent Kuhn that "when he entered Tarpey's vehicle, he observed numerous papers in the car, among them in plain view on the seat was [a Maas Brothers] bill of lading" (H150). Nevertheless, Agent Kuhn sought a warrant to search Tarpey's car after having participated in the drafting of his affidavit and after having read it. The affidavit stated in pertinent part (par. 22):

> "When the agent entered the vehicle, he observed numerous papers in the car. Among them in plain view on the seat was a [Maas Brothers] bill of lading." (A61a).

Agent Kuhn, both at the hearing and at the trial, acknowledged that this statement was not true and that he was aware of its falsity prior to swearing to the truth thereof before the United States Magistrate (H122-123; T501).

In *Franks v. Delaware,* 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), the United States Supreme Court held that if after a suppression hearing, a defendant established by a preponderance of the evidence that a false statement was included in an affidavit to secure a warrant knowingly and intentionally or with reckless disregard of the truth and the false

statement was necessary to the finding of probable cause, then the search warrant must be voided and the fruits of the search excluded from the trial to the same extent as if probable cause was lacking on the face of the affidavit.

Here, Agent Kuhn's admittedly false representations were the only basis upon which a reasonable judicial officer would even consider the existence of probable cause to issue a search warrant for Tarpey's car. Clearly, a redaction of Agent Kuhn's false statements would leave the affidavit totally devoid of any probable cause for the issuance of a search warrant for Tarpey's vehicle.

It is clear that Kuhn knew the purpose of his affidavit (T501; H120-121) and, we submit, realized that the representations as set forth in his affidavit would more easily pass judicial muster, without inquiry, than a story about an agent hitting the vehicle's brakes at no more than two to three miles an hour and having a pile of incriminating documents conveniently float from under a passenger's front seat. The documents which allegedly were found in Tarpey's car, pursuant to the warrant, were of the most incriminating nature and without their admission in evidence. Tarpey most surely would not have been convicted.

Since *Franks* was decided, several courts of appeal have embraced its holding and teachings. *See, United States v. Young Buffalo,* 591 F. 2d 506 (9th Cir. 1979); *United States v. Goldberg,* 582 F. 2d 483 (9th Cir. 1978); *United States v. Cruz,* 594 F. 2d 268 (1st Cir. 1979); *United States v. Melvin,* 596 F. 2d 492 (1st Cir. 1979); *United States v. Broward,* 594 F. 2d 345, 351 (2d Cir. 1979) ("Such an egregious practice defeats the whole point of the procedure, having a judicial officer make an independent assessment of whether probable cause exists.")

There are three false statements included in the above quoted two sentences of Kuhn's affidavit. Out of the twenty-eight quoted words, fifteen of them are untrue. More significant, however, than numbers, is the totally false picture painted by the sworn representations.

The untrue statements and words are:

> "When the agent entered the vehicle, he observed . . . on the seat . . . a bill of lading. . . ."[13]

The "error", as the court below kindly called it, "was the statement that invoices were seen *on the seat* of the car *upon Agent Colgan's entering the car,* whereas in fact they were seen *on the floor* of the car when they slid into view upon *Agent Colgan's sudden application* of the brakes to avoid traffic." (Emphasis added.)

Our contentions here are of substance and not semantics. The three false "*statements*" portray the *event differently than the alleged truth.*

We submit that the false statements[14] were made knowingly and intentionally or, at the very least, with reckless disregard of the truth and that the false statements were necessary to the finding of probable cause.[15] The statements are material to *what* was found, *when* it was found and *where* it was found. As to

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13. No bills of lading were found.

14. Kuhn: "I knew that was not true when I swore to the affidavit." (T501, *see also,* H121-122).

15. *Franks v. Delaware, supra.*

each, the statements were false and made knowingly and intentionally. The overall thrust of the two sentences containing the statements clearly convey a picture which would arouse little inquiry by a prudent Magistrate. The "true" version, on the other hand, we submit, should cause the Magistrate pause to consider the fortunate circumstance of hitting the brakes and watching the evidence slide out from under the seat.

We respectfully submit that the record is in conflict with the Circuit Court's conclusion that there was an immaterial "error" which the agent didn't "catch". We submit that the record is clear that the agent knew the true facts, knew what he was doing, knew the significance of his representations and sought to fraudulently avoid judicial scrutiny of the details of "what", "where" and "when".

CONCLUSION

For the reasons set forth herein, this petition for a writ of certiorari should be granted and the judgment below reviewed.

Respectfully submitted,

MICHAEL ROSEN

SAXE, BACON & BOLAN, P.C.
Attorneys for Petitioner

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Twentieth day of August, one thousand nine hundred and eighty.

Present:

HONORABLE AMALYA L. KEARSE, *Circuit Judge,*

HONORABLE CALEB R. LAYTON, III, *District* Judge,*

HONORABLE EDWARD DUMBAULD, *District* Judge.**

FILED AUGUST 20, 1980
A. Daniel Fusaro, Clerk

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* Senior District Judge of the United States District Court for the District of Delaware, sitting by designation.

** Senior District Judge of the United States District Court for the Western District of Pennsylvania, sitting by designation.

Opinion

80-1088
80-1100

UNITED STATES OF AMERICA,

Appellee,

- v. -

JOHN TARPEY and MALBEN BUCHWALD,

Defendants-Appellants.

Appeals from the United States District Court for the Eastern District of New York.

These causes came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are *affirmed.*

Appellants John Tarpey and Malben Buchwald appeal from judgments of conviction entered after a trial before Judge Edward Neaher in the United States District Court for the Eastern District of New York, for possession of property stolen from a truck in interstate commerce, and conspiracy to receive and possess such property, in violation of 18 U.S.C. §§371 and 659.

On appeal, appellant Tarpey contends that certain evidence introduced against him should have been suppressed because

there was no probable cause for his arrest, because his automobile was entered without his consent, and because a search warrant issued thereafter authorizing the search of the car was procured by means of a false affidavit. Tarpey also argues that the indictment against him should be dismissed because of pre-indictment delay and that his conviction should be reversed because of an erroneous evidentiary ruling at trial. We find no merit in any of these contentions.

As to Tarpey's arrest and search contentions, the evidence included the following. On the day of the arrest, FBI agents had observed one Edward Karnefsky delivering stolen cartons in a green van. After Karnefsky had returned to his loading point and set out again in the same van, the arresting agents followed Karnefsky. They saw Tarpey weave in and out of traffic erratically and at high speed, catch up with Karnefsky's van at a red light, leave his car to speak and gesture to Karnefsky, apparently giving directions. They then saw Karnefsky in his van follow Tarpey's car sedately to a street some 40 blocks away where Tarpey pulled to the curb and Karnefsky pulled up alongside Tarpey's car, and both men left their vehicles. One of the agents approached Karnefsky who voluntarily agreed to show the agent what was in his van, and the agent observed the stolen cartons and crates. From this sequence of events and the presence of the stolen cartons in Karnefsky's van, the agents had reasonable ground to believe that Tarpey was directing the delivery of the cartons or was otherwise connected with their distribution. Thus, probable cause existed for his arrest.

We find no merit in Tarpey's challenge to the legality of the search of his car. Agent Colgan's initial entry into the car, even if made without Tarpey's consent, did not violate his Fourth Amendment rights because Colgan's purpose was to secure the

car, not to search it. *See United States ex rel. LaBelle v. LaVallee*, 517 F.2d 750, 755 (2d Cir. 1975), *cert. denied*, 423 U.S. 1062 (1976). The warrant later obtained for the search of the car was not rendered invalid by the error in agent Kuhn's affidavit in support of the application for the warrant. The error, which was acknowledged by agent Kuhn who stated that he did not catch it when he read the affidavit prior to signing it, was the statement that invoices were seen on the seat of the car upon agent Colgan's entering the car, whereas in fact they were seen on the floor of the car when they slid into view upon agent Colgan's sudden application of the brakes to avoid traffic. This discrepancy was not material to the existence of probable cause for the warrant to issue.

We also reject Tarpey's speedy trial claims. Violation of the interim timetables contained in the Eastern District Plan for Prompt Disposition of Criminal Cases does not require dismissal of the indictment. *United States v. New Buffalo Amusement Co.*, 600 F.2d 368, 376 (2d Cir. 1979). Nor did Tarpey show any constitutional violation since he made no showing that the delay was for other than good faith investigative purposes, *United States v. Lovasco*, 431 U.S. 783 (1977); *United States v. Watson*, 599 F.2d 1149, 1153 (2d Cir. 1979), and did not even argue to the district court his present contention that delay was prejudicial to him, because Karnefsky, a possible witness in his favor, disappeared during the period of delay.

Finally, we reject Tarpey's contention that the district court erred at trial in ruling that Tarpey's counsel could not elicit from agent Mika on cross-examination a statement Tarpey had made to him concerning Tarpey's relationship with Karnefsky. The district court did not err in excluding the statement on hearsay

grounds, since the statement was offered for the truth of its contents, not for any more limited purpose. Fed. R. Evid. 801(d)(2).

Appellant Buchwald's sole contention on appeal is that the evidence against him was insufficient for a conviction. We disagree. The agents testified that they had observed the loading of stolen cartons into a yellow van, followed the van to a store owned by Buchwald, and watched while the cartons were unloaded from the van and carried by Buchwald's stepson and others into the store. When the unloading ceased, and agents entered the store, they observed the stolen cartons, some with their labels still attached, and found Buchwald present; they had not seen Buchwald enter or leave the store during the loading although he told the agents that he had just arrived. This evidence was sufficient to permit the jury to infer that Buchwald was present during the entire unloading, that he knew the packages had been stolen, and that he had agreed to receive them.

The judgments of conviction are affirmed.

s/ Amalya L. Kearse
AMALYA L. KEARSE, U.S.C.J.

s/ Caleb R. Layton, III
CALEB R. LAYTON, III, U.S.D.J.

s/ Edward Dumbauld
EDWARD DUMBAULD, U.S.D.J.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

FILED FEB. 25, 1981
A. Daniel Fusaro, Clerk

80-1088
80-1100

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 25th day of February, one thousand nine hundred and eighty-one.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN TARPEY, MALBEN BUCHWALD,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, John Tarpey,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

Order

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

s/ A. Daniel Fusaro,
Clerk

Office-Supreme Court, U.S.
FILED
JUN 24 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1731

In the Supreme Court of the United States

OCTOBER TERM, 1980

JOHN TARPEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

MARSHALL TAMOR GOLDING
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the agents had probable cause to arrest petitioner.

2. Whether Agent Colgan's warrantless entry into the car petitioner had been driving violated petitioner's Fourth Amendment rights.

3. Whether the warrant to search the car should have been voided because the agent failed to notice a factual error contained in the affidavit submitted to the magistrate in support of the warrant.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1731

JOHN TARPEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1980. A petition for rehearing was denied on February 25, 1981 (Pet. App. 6a-7a). The petition for a writ of certiorari was filed on April 16, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of conspiracy to receive and possess, and of possession of, property stolen from an interstate shipment, in violation of 18 U.S.C. 2, 371 and 659. He was sentenced to

concurrent terms of five years' imprisonment on each count and fined $10,000 (Pet. 2). The court of appeals affirmed (Pet. App. 1a-5a).

1. On May 13, 1978, a tractor-trailer carrying $100,000 worth of merchandise—dresses, glassware, cosmetics, and other items—that was being shipped from Q.T. Consolidating Company, North Bergen, New Jersey, to Maas Bros., Inc., Tampa, Florida, was stolen from a parking lot in Secaucus, New Jersey. F.B.I. agents found the abandoned and empty tractor-trailer in Brooklyn, New York, three days later (Pet. 2-3; H. Tr. 253-254; Tr. 161-164).[1] The following day, May 17, a group of agents, including Agents John Kuhn and Richard Mika, began surveilling an open lot in which two trailers containing numerous cartons from the stolen shipment were parked (H. Tr. 13-16; Tr. 106-109, 165-166, 580-584). The agents observed co-defendants John Cerverizzo, Robert Peppaceno and Edward Karnefsky loading cartons from the trailers into a yellow truck and a green van (Pet. 3; H. Tr. 13-16; Tr. 109-115). Two agents followed the yellow truck to a candy store known as Tina's Stationery, which was owned by co-defendant Malben Buchwald, where the cartons were unloaded and taken into the store (Pet. 3-4; Tr. 168-172, 296-299; H. Tr. 251-254, 260-267). After the cartons were identified as having been part of the stolen shipment, Cerverizzo and Peppaceno, who had driven the truck to the store, were arrested (Pet. 4; H. Tr. 256-259).[2]

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[1]"H. Tr." refers to the transcript of the pretrial hearings on the defense motions to suppress. "Tr." refers to the transcript of the continuation of arguments, and the district court's oral rulings, on various pretrial motions, including an application by petitioner for reconsideration of his motion to suppress, and the trial.

[2]Buchwald was arrested five days later (see H. Tr. 297-298). He was convicted, and his appeal was heard together with petitioner's.

Two other agents followed the green truck, which was driven by co-defendant Edward Karnefsky,[3] to a private house, where it was unloaded (Pet. 3; H. Tr. 17-18). Karnefsky then returned to the lot and, a short while later, departed after apparently loading more cartons into the truck. As Karnefsky left the lot, Agents Kuhn and Mika followed him in separate cars. They shortly were overtaken and passed by petitioner, who weaved erratically through the traffic at high speed until he caught up with Karnefsky at a red light (Pet. 4; H. Tr. 24-26, 46-47, 78-80, 83). At that point, petitioner got out of his vehicle, walked over to Karnefsky, spoke to him, and gestured with his arm as if pointing out a direction (Pet. 4; H. Tr. 21, 26, 81). Petitioner then reentered his vehicle and drove off at a moderate rate of speed with Karnefsky following him (H. Tr. 26-28, 81-83).

Shortly after 4:00 p.m. (H. Tr. 88), after traveling some 40 blocks, petitioner parked at the curb and got out of his car. Karnefsky double parked next to him (H. Tr. 28, 82-83). The agents pulled in front of and behind the two vehicles. Agent Mika approached petitioner, asked him to step into the FBI vehicle, and asked to see his driver's license and vehicle registration. Petitioner produced an expired New York State driver's license and a registration disclosing that the vehicle he was driving was registered to Buchwald (H. Tr. 28-29, 84). In response to Mika's question, petitioner stated that he knew Karnefsky and that Karnefsky was following him to his vending business office. Mika advised petitioner of his rights and that he was being detained in order to determine whether the green van contained stolen property (H. Tr. 29-31).

Meanwhile, Agent Kuhn had approached Karnefsky and asked him what was in the back of the truck. Karnefsky

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[3]Karnefsky is a fugitive and has not been brought to trial (Tr. 66).

voluntarily opened the rear door, and Kuhn observed five boxes and five crates with markings indicating that they were consigned to Maas Bros., Tampa, Florida (H. Tr. 84-85). In response to Kuhn's question, Karnefsky stated that he did not know petitioner and had merely asked him for directions (H. Tr. 86).

The two agents then compared notes (H. Tr. 31-32, 87-88). Thereafter, they detained petitioner and Karnefsky on suspicion of involvement in the transportation of stolen merchandise (H. Tr. 114) while Kuhn made a series of telephone calls to the supervisor in the New York FBI office who dealt with hijacking (H. Tr. 88). From these telephone calls the agents learned of the activities and the arrests at Buchwald's candy store and the fact that the property recovered there had been identified as stolen property consigned to Maas Bros. (H. Tr. 89-90, 132-135). They also learned that petitioner had previously been convicted of conspiracy to possess property stolen from an interstate shipment (H. Tr. 91). At 5:30 or 5:45, Agent Colgan, who had arrested petitioner in the previous case, arrived to assist (H. Tr. 90, 140, 161). After conferring with Mika and Kuhn, Colgan contacted his supervisor to request authorization from the United States Attorney's office to arrest petitioner and Karnefsky (H. Tr. 141-142).[4] When authorization finally was obtained (H. Tr. 143), petitioner and Karnefsky were formally arrested at 6:50 p.m. (H. Tr. 162).

2. After petitioner was arrested, he expressed concern to Agent Mika about the security of his automobile, since the keys to the vending machines were in the trunk of the vehicle. He asked Mika if it would be permissible for him to park the vehicle in a nearby parking lot that belonged to a

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[4]The practice in the Eastern District of New York at that time was for FBI agents to obtain authorization from the United States Attorney's office before making an arrest (H. Tr. 142).

friend of his named Ralphie. Mika replied that it would not be permissible because petitioner was under arrest, but that the agents would move the vehicle to the parking lot if petitioner desired. Petitioner agreed and gave Mika the keys to his car (H. Tr. 34-35). Mika informed Colgan of the problem, and Colgan accompanied petitioner to Ralphie's office, where petitioner told Ralphie that the agents would turn over the car and the keys to him in the near future. Ralphie agreed to secure petitioner's car for the night (H. Tr. 35, 144-145). Colgan then brought petitioner back outside and Mika handcuffed him. At approximately 7:15 p.m. Mika drove petitioner and Karnefsky away in an FBI vehicle, while Kuhn took charge of Karnefsky's truck (H. Tr. 35-36, 93, 145-146).

As the other agents left, Colgan, to whom Mika had given the keys to petitioner's automobile (H. Tr. 35, 145-146), entered the vehicle for the purpose of driving it the 30 feet to the parking lot (H. Tr. 147, 160).[5] As Colgan started to pull out, another car came by and Colgan applied the brakes. When he did so, papers slipped out from under the front passenger seat, and he noticed that one was a consignment slip to Maas Bros., Tampa, Florida, with an invoice number (H. Tr. 147). Accordingly, instead of proceeding into the parking lot, Colgan went to a nearby telephone booth and called his supervisor, who directed him to secure the vehicle until it could be towed away (H. Tr. 148-149).[6]

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[5]Under cross-examination, Colgan testified that he had implied, but not express, authorization from petitioner to enter the car to move it (H. Tr. 151). Colgan, however, had not been present when Mika received express authorization from petitioner for the agents to move the car to the parking lot (see H. Tr. 35).

[6]Petitioner offered an entirely different version of the circumstances surrounding Agent Colgan's entering the car. Petitioner claimed never to have consented in any manner to the agents' entering or moving the vehicle (H. Tr. 190). According to petitioner, upon his arrest Colgan asked him if he had somebody to take care of the car and he replied that he would speak to Ralphie. At that point an acquaintance named

The next day, pursuant to a warrant, FBI agents searched petitioner's impounded automobile and seized 255 shipping documents showing Maas Bros. as consignee and two small black notebooks (H. Tr. 99). Agent Kuhn had signed the affidavit in support of the warrant application, but it had been drafted by an Assistant United States Attorney on the basis of information she had received from Kuhn and from other agents through Kuhn (H. Tr. 94, 97-98, 136). Colgan

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Lennie Insalaco came along, and petitioner told Colgan that Insalaco, who worked out of the same office that he did, could take care of the vehicle. When he started to hand the keys to Insalaco, however, Colgan grabbed them and told Insalaco to go into the office, telling petitioner that Insalaco should stay out of the matter so as not to get locked up (H. Tr. 192-193).

Insalaco testified that he came upon the scene around 4:00 or 4:30 and saw petitioner sitting in his car, but did not speak to him (H. Tr. 169, 176-177, 179). Instead, he went into Ralphie's place of business and stayed 25 to 30 minutes (H. Tr. 179-180, 183). He then left and walked to the corner to get a soda, again passing petitioner without speaking to him. Twenty to 30 minutes later, he returned (H. Tr. 183-184). As he walked up, he heard petitioner, Ralphie, and an agent discussing whether Ralphie would secure the car (H. Tr. 184-185). Upon seeing Insalaco, petitioner said that he wanted him to take the car and bring it to the office; petitioner specifically added that "by no means" did he want the agent to have the vehicle (H. Tr. 171-173, 185). On direct examination, Insalaco said that petitioner's words were that he wanted Insalaco to have "the keys," and that he reached to take them but the agent grabbed them instead and then told him that he could have the keys and the car and said that he should sign a release and would be given the keys and could take the car away (H. Tr. 185). On both direct and cross-examination, Insalaco said that he was told to wait inside the building, and that 45 minutes later he saw the car being driven away backwards up the street (H. Tr. 172-173, 185-187). On direct examination, he also stated that it was dark and he could not see who was driving the car (H. Tr. 173).

Both Colgan and Mika denied that the key grabbing incident had occurred (H. Tr. 69, 164). Colgan testified that the only "semblance of accuracy to that story" was that, prior to petitioner's arrest, Colgan, someone whom Colgan did not know, and petitioner had engaged in a street conversation during which no transfer of anything occurred (H. Tr. 164).

had advised Kuhn that he had observed the papers found in petitioner's vehicle under the front seat, and Kuhn had passed that information on to the Assistant United States Attorney. The affidavit, however, stated that as Colgan entered the car he observed the papers in plain view on the seat of the vehicle. Kuhn read the affidavit before signing it, but he did not read the inaccurate paragraph closely and therefore did not catch the mistake (H. Tr. 98-99, 123). Indeed, Kuhn did not become aware of the inaccuracy until the prosecutor pointed it out to him subsequent to the agents' execution of the warrant (H. Tr. 136-137).

ARGUMENT

1. Petitioner first contends (Pet. 13-17) that the search of his car was tainted because there was no probable cause for his prior arrest. On the basis, however, of Karnefsky's prior removal of stolen goods from the lot and delivery of them to the private house (of which Agent Mika, at least, was aware (H. Tr. 22)), the agents had an articulable and reasonably based suspicion that Karnefsky was in the process of making a second delivery of stolen goods. Petitioner's actions in overtaking and then leading Karnefsky gave the agents objective reason to suspect that he too was involved in that delivery. Thus, as the district court found (Tr. 14), the agents were justified in stopping both men to make inquiry. See *Terry* v. *Ohio*, 392 U.S. 1 (1968).

From that point forward, the quantum of "cause" that the agents possessed multiplied. First, upon Agent Mika's request, petitioner produced an expired driver's license and a registration for the car he was driving in the name of co-defendant Buchwald. Once the agents found goods they believed to be stolen in Karnefsky's van and discovered that he and petitioner had given conflicting versions of their relationship to each other, they had probable cause to arrest petitioner. As the court of appeals put it (Pet. App. 3a), "[f]rom this sequence of events and the presence of the

stolen cartons in Karnefsky's van, the agents had reasonable ground to believe that [petitioner] was directing the delivery of the cartons or was otherwise connected with their distribution. Thus, probable cause existed for his arrest." The agents had additional cause to arrest when they subsequently learned of the arrests at the candy store, the identification of the goods delivered to that store as some of those that had been stolen from the shipment to Maas Bros., the apparent involvement of Buchwald (the registered owner of the automobile that petitioner was driving), and petitioner's prior interstate theft conviction. It is of no moment that, out of an abundance of caution, the agents did not formally make the arrests until long after they had a basis for doing so, since the detention during this period was supported by probable cause; moreover, no evidence against petitioner resulted from the delay in formally arresting him.[7]

Petitioner's reliance (Pet. 13-17) on *Dunaway* v. *New York*, 442 U.S. 200 (1979), is wholly misplaced. The decision in *Dunaway* turned on the fact that the detention in that case was not supported by probable cause. Here, by contrast, there was probable cause to arrest petitioner almost from the outset of his detention.

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[7]Petitioner attaches great weight to what he describes (Pet. 6, 17) as Agent Kuhn's testimony that the time between petitioner's initial detention and formal arrest was spent trying to figure out with what, if anything, he would be charged. In fact, petitioner's counsel phrased cross-examination questions to Kuhn in those terms and received as responses, "[b]asically, yes" (Tr. 508; H. Tr. 131). A similar question to Agent Mika, however, drew a negative response (H. Tr. 42). It is clear from the testimony of both agents, however, as well as that of Agent Colgan, that the time was spent first in ascertaining what information had been developed by agents involved in other phases of the investigation, and then in waiting for authorization to make the arrests from the United States Attorney's office.

2. Petitioner next contends (Pet. 17-21) that the search of the car was tainted because Agent Colgan's entry into the vehicle for the purpose of securing it was unauthorized and illegal. This contention also is without merit.

In the first place, the evidence petitioner offered to establish Colgan's lack of authority to enter the vehicle was internally contradictory. For example, Insalaco testified that he first arrived on the scene around 4:00 or 4:30, spent 25 to 30 minutes in Ralphie's place of business and another 20 to 30 minutes getting a soda, and at that point came upon petitioner, Ralphie, and an agent (who was shown to be Colgan) discussing the securing of petitioner's vehicle (H. Tr. 169, 176-177, 179, 183-185). Thus, by Insalaco's own account, it was 5:30 at the latest when petitioner attempted to hand him the keys to the car. But Colgan did not arrive on the scene until 5:30 to 5:45 (H. Tr. 140, 161), and petitioner's arrest—the event that necessitated arrangements to secure the vehicle—did not occur until 6:50 (H. Tr. 162). Similarly, Insalaco testified that he waited 45 minutes before seeing the car driven off and that he could not see who was driving because it was dark (H. Tr. 172-173, 185-187). By his chronology, this event would have taken place no later than 6:30. However, in New York, on May 17, with daylight savings time in effect, it is still quite light at 6:30 (see H. Tr. 209). Finally, Insalaco testified that the agent agreed to his taking custody of the vehicle and directed him to go inside the building to wait for a release to sign (H. Tr. 185). Petitioner, testifying about the same event, contradicted Insalaco by stating that the agent (whom he identified as Colgan) directed Insalaco inside the building and told petitioner that Insalaco should stay out of the matter so as not to get locked up (H. Tr. 193).

Even more significantly, while the district court did not expressly discredit the testimony of petitioner and Insalaco, it found (Tr. 15) that the "arrangement made" was that

Ralphie was "to assist" petitioner by permitting Colgan to "deposit the car" in Ralphie's parking lot. In short, the court's finding was that Colgan entered the car solely for the purpose of securing it on petitioner's behalf. Nothing in the evidence suggests that Colgan used or intended the security arrangement as a pretext for searching the car, and petitioner makes no such claim.[8] Thus, even if Colgan did undertake to handle the car's security against petitioner's wishes, there would be no Fourth Amendment violation. The Fourth Amendment does not protect against all invasions of property rights, but only against "unreasonable searches and seizures." Here there was no search; the shipping documents came into plain view when Agent Colgan applied the brakes. We doubt that Colgan's entry into the car to move it properly can be considered a seizure, since the agent asserted no dominion over the vehicle adverse to petitioner's interest. But even if it can be, since the "seizure" was for the benign purpose of securing the car for petitioner's benefit, we submit that it cannot be characterized as "unreasonable." Cf. *United States* v. *Markland*, 635 F. 2d 174, 176 (2d Cir. 1980), cert. denied, No. 80-6454 (May 18, 1981). This Court has explained that the exclusionary rule is a remedial device, the application of which "has been restricted to those areas where its remedial objectives are thought most efficaciously served." *United States* v. *Calandra*, 414 U.S. 338, 348 (1974). Where, as here, there is no intent to search or otherwise invade privacy, the remedial objectives of the exclusionary rule simply are not served by applying the rule to what is at most a law enforcement officer's insistence on securing an arrestee's vehicle in disregard of the arrestee's own wishes.

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[8]Agents Mika and Colgan testified on cross-examination that they had no reason to believe that contraband or evidence would be found in petitioner's vehicle (H. Tr. 70, 162).

Finally, Agent Colgan was entitled, if not obligated, to enter the vehicle for the purpose of securing it in the performance of what this Court has described as law enforcement officers'" 'community caretaking functions.' " *South Dakota* v. *Opperman*, 428 U.S. 364, 368 (1976); *Cady* v. *Dombrowski*, 413 U.S. 433, 441 (1973).[9] Petitioner attempts (Pet. 19-20) to distinguish *Opperman* and *Dombrowski* on the ground that in those cases the defendants were not available to arrange for the safekeeping of their cars. To be sure, that factor is not present here. As the district court noted (Tr. 14-15), however, there is an additional circumstance in the present case—the fact that the car was registered in someone else's name—that called for the performance of the agents' " 'community caretaking function.' "

3. Finally, petitioner claims (Pet. 22-25) that the search warrant that the agents subsequently obtained was invalid because the affidavit submitted in support of it inaccurately stated that as Agent Colgan entered the vehicle he observed the incriminating shipping documents in plain view on the car seat. In *Franks* v. *Delaware*, 438 U.S. 154 (1978), the Court held (*id.* at 155-156) that a search warrant would be voided if the defendant proved, by a preponderance of the evidence, "that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause * * *." Contrary to petitioner's assertions, however, the inaccuracy in the affidavit was neither an intentional nor a material falsehood.

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[9]Relying on *Opperman*, *supra*, the district court opined (Tr. 14-15) that Agent Colgan would have been justified in entering the car even for the purpose of impounding it.

Agent Kuhn did not, as petitioner represents (Pet. 22), acknowledge that he "was aware of [the statement's] falsity prior to swearing to the truth thereof before the United States Magistrate." Rather, the agent testified that he knew that the documents had come into view when they slipped out from under the driver's seat, but that he did not appreciate, from his hasty reading of the affidavit (see H. Tr. 99), that it related the facts any differently (H. Tr. 123). In *Franks* v. *Delaware, supra*, 438 U.S. at 170, this Court expressly held that a search warrant would not be voided simply because "police have been merely negligent in checking or recording the facts relevant to a probable-cause determination."[10]

Moreover, the discrepancy was immaterial to the finding of probable cause for issuance of the search warrant. Rather, the crucial fact in obtaining a warrant to search the car was that the shipping documents were observed in it; whether Agent Colgan saw them on the seat as he entered the car, or whether they came into view only when he subsequently applied the brakes, is entirely irrelevant.[11]

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[10]In contrast to his argument before this Court (Pet. 25), at the suppression hearing petitioner's counsel expressly eschewed "saying [the affidavit] is intentionally false" (H. Tr. 212).

[11]Petitioner argues (Pet. 23, 25) that the magistrate might not have issued the warrant without further inquiry had he been informed of the actual manner in which the documents were found. But no evidence adduced at the suppression hearing called into question the truth of Agent Colgan's testimony that the shipping documents slid into view when he applied the brakes. Hence, there is no reason to believe that the magistrate would not have issued the warrant on the basis of the "true" version of how the documents came to Agent Colgan's attention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

MARSHALL TAMOR GOLDING
Attorney

JUNE 1981

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No. 80-1731

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F I L E D
AUG 21 1981
ALEXANDER L. STEVAS,

In The

Supreme Court of the United States

October Term, 1980

JOHN TARPEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONER

MICHAEL ROSEN
SAXE, BACON & BOLAN, P.C.
Attorneys for Petitioner
39 East 68th Street
New York, New York 10021
(212) 472-1400

4834 LUTZ APPELLATE PRINTERS, INC.
NY (212) 840-9494 • (516) 222-1606 • (914) 683-9363
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No. 80-1731

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REPLY BRIEF FOR PETITIONER

This reply brief is respectfully submitted to bring to this Court's attention the factual misstatements and misleading arguments in the Government's brief.

A. The Probable Cause to Arrest Issue

Petitioner concedes that Agents Kuhn and Mika had probable cause to detain and arrest Karnefsky. After all, they had seen him load and unload cartons which they knew were part of the stolen shipment. As they were trailing Karnefsky down Pennsylvania Avenue there can be no question that the agents knew that the green van contained contraband.

Petitioner's existence was unknown to the agents until the encounter at the traffic light on Pennsylvania Avenue. Even assuming, *arguendo*, that petitioner's actions raised the interest of the trailing agents, which justified a *Terry v. Ohio* stop, the Government's argument that "from that point forward the quantum of 'cause' that *the agents possessed* multiplied" is factually and unsupported by the record.[1] (Emphasis added.)

Initially, it must be noted that the Government apparently agrees with petitioner that a key factual finding made by the Court of Appeals for the Second Circuit is erroneous. In finding probable cause for petitioner's arrest, the court below relied exclusively on what the agents saw as they trailed petitioner and Karnefsky and when the latter opened his van. The court below incorrectly found that when petitioner parked his vehicle at the curb and Karnefsky double parked near him, "both men left their vehicles."[2]

However, such a significant event did not happen as is apparently conceded on page three of the Government's brief. It is respectfully submitted that the above-described erroneous conclusion of the court below substantially weakens its finding of probable cause. In fact, the record clearly establishes that petitioner parked his vehicle legally and was walking on the sidewalk away from Karnefsky — without speaking to him — when Agent Mika "detained" or arrested him.

The Government's multiplication of the quantum of "cause" theory is pure speculation unsupported by the record. We realize that the Government must justify holding petitioner on the street

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1. Gov't Brief, p. 7.

2. Petitioner's Appendix, p. 3a.

from 4:15 p.m. until 7:15 p.m., however its feeble attempt to do so belies the credibility of its ultimate position on the "cause" issue.

The Government's position is:

1. Petitioner was properly detained on 57th Street for three hours "in order to determine whether the green van contained stolen property" (Gov't Br. p. 3).

Yet, even before stopping the van the agents knew Karnefsky was moving Maas Bros. stolen property in that van. They had not lost sight of him since he left the truck yard on Alabama Avenue after reloading.

Furthermore, Agent Kuhn, upon stopping Karnefsky, was shown the contents of his van and he immediately observed Maas Bros. cartons therein.

Clearly, the Government's contention on this point is unsupported by the record. What is significant, we submit, is the painfully obvious failure (both by the Government and the court below) to come to terms with the testimony of Agent Kuhn that *the several hours were spent trying to figure out what, if anything, petitioner would be charged with.* The Government's position (Br. p. 8, Fn. 7), that this critical testimony has little weight because it was elicited from a trained FBI Agent on *cross-examination,* is truly mystifying, yet revealing. If that is the best the Government can do, we submit its response should be deemed a concession on the probable cause issue.

2. Part of the multiplication of "cause" was the fact that petitioner was driving a vehicle registered to Malben Buchwald, who owned Tina's Stationery Store where arrests had been made earlier.

Yet, there is no proof in the record that prior to arresting petitioner (either at 4:15 p.m. or 7:15 p.m.) *the agents on 57th Street knew that Buchwald was connected with Tina's Stationery Store.*[3] *As the Government concedes, Buchwald was not even arrested until five days later* (Br. p. 2).

Thus, the "Buchwald factor" could not have been part of the alleged probable cause.

3. Karnefsky and petitioner gave conflicting versions of their relationship to each other (Gov't Br. p. 7). As stated in the petition herein, it is obvious that Karnefsky was transporting stolen property and that *he* lied about petitioner, while petitioner told the truth about knowing and travelling with Karnefsky. We are puzzled that there can exist a rule of law or evidence that allows an inference of culpability against the truthful person.

4. Kuhn learned, in a series of telephone calls to a supervisor, that petitioner had previously been convicted of conspiracy to possess stolen property (Gov't Br. p. 4).

There is no such testimony in the record.[4]

In summary, we respectfully submit that the factors which the Government contends *multiplied* to establish probable cause, were non-existent at the time in question and should be

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3. The Government refers to Buchwald's "apparent involvement." (Br. p. 8).

4. Query: Would this be a proper factor in making a determination of probable cause?

subtracted from any evaluation whether there existed probable cause for the detention/arrest of petitioner.[5]

B. Colgan's Entry into Petitioner's Vehicle

It is undisputed that petitioner's vehicle was legally parked and posed no hazard to the public.

The Government contends the following:

1. Petitioner "agreed" to allow the agents to move the vehicle to his friend Ralphie's nearby parking lot.[6]

Yet, Agent Mika testified that petitioner never asked him or any agent to move the vehicle.[7]

2. After petitioner "consented" to the agents moving the vehicle he turned over the keys to Agent Mika.[8]

Yet, the record establishes beyond peradventure that at 5:30 p.m., when petitioner was allowed to sit in his vehicle, he gave the keys to Agent Mika.

Thus, it is respectfully submitted, the Government's attempt to argue "consent" is clearly contradicted by the record. In fact,

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5. Petitioner contends that there was no probable cause to arrest. If he had not been arrested the agents would not have had access to his vehicle or to a notebook seized during a subsequent search of his person.

6. Gov't Brief, p. 5.

7. It is significant to note that Agent Kuhn swore under oath to the United States Magistrate who issued the search warrant, that "[petitioner] *asked* the agent to move the car to a nearby lot." (Emphasis added.)

8. At approximately 7:15 p.m.

neither the District Court nor the court below found that petitioner consented to the entry into his vehicle.

There is no dispute that petitioner was able to and did arrange for the care and security of the vehicle and its contents with individuals known to him at the scene.[9] No cogent reason has been offered by the Government why petitioner's wishes and plans were thwarted by Colgan. *Cady v. Dombrowski*, 413 U.S. 433 (1973); *South Dakota v. Opperman*, 428 U.S. 364 (1976).

The Government now concedes that the critical facts justifying securing the vehicles in *Dombrowski* and *Opperman* are not present here.[10] In a weak attempt to support the "community caretaking function" it now argues that entry was justified because the vehicle belonged to Buchwald. While offering no legal authority for its position the Government apparently has overlooked the possibility that the documents which allegedly "floated" from secrecy under the seat also belonged to Buchwald.

The Government argues (Br. p. 10) that petitioner makes no claim that Colgan entered the vehicle as a pretext for searching it. Such argument is technically correct. However, in light of all the evidence, petitioner consistently has claimed that the documents, allegedly found in the vehicle, never were in the vehicle.[11]

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9. Colgan was present when petitioner arranged with his friend Ralphie to get the "car *and* the keys." Ralphie agreed to secure the car for the night (Gov't Br. p. 5). While the Government scoffs at the testimony of Lenny Insalaco and petitioner, regarding additional arrangements for the vehicle, it concedes that the District Court did not discredit their testimony (Gov't Br. p. 9).

10. Gov't Br. p. 11.

11. There was a prior relationship between petitioner and Colgan. Colgan,

(Cont'd)

(Cont'd)

the more experienced agent, was "called in to assist" the agents on the scene and wound up alone with petitioner's vehicle.

The proof at trial established that the agents assigned to investigate the interstate theft were in possession of 365 stolen cartons *prior* to encountering petitioner at approximately 4:00 p.m. May 17. From that point forward petitioner and his vehicle were under constant observation and control of the agents. The documents would have had to be in the vehicle at that point in time.

Expert testimony offered by petitioner, without rebuttal, established that the driver of the hijacked truck would only have four pieces of paper in his possession, namely, a bill of lading and a three page manifest listing the number of cartons being shipped. Other experts testified that the "shipping documents," namely, *invoices* and *packing slips* were sealed in each of the cartons or, sometimes, placed in cellophane envelopes which were attached to the outside of the cartons. While a cellophane bag was found at Tina's Stationery — where cartons of bathroom scales were seized — the testimony of five agents, as to their observations on *May 17*, leads to the conclusion that the shipping documents were enclosed in their respective cartons. Agents Coldonato and Conlin testified that they saw only *labels* on the cartons. Agent Cox testified that he saw no shipping documents affixed to any cartons — which were basically all closed, some with steel bands around them. Agent Mika recalled seeing mostly closed cartons with no shipping documents affixed. Agent Kuhn did not see any open cartons and none with shipping documents attached.

Photographs taken by the FBI the following day — May 18 — depicted most of the cartons closed.

It was the day thereafter — May 19 — that Agents Kuhn and Colgan "searched" petitioner's vehicle and "found" 265 shipping documents.

Query: Since petitioner was stopped at 4:00 p.m. May 17, and the cartons were primarily still closed on May 18, how could the predominantly enclosed shipping documents be "found" in petitioner's vehicle?

C. The Search Warrant

The Government is misinformed as to the chronology of events concerning the warrant and the search. It states (Br. p. 6) that the search of petitioner's vehicle was the "next day" after petitioner's arrest. This is inaccurate. Petitioner was stopped and arrested on May 17. He was brought before the Magistrate to fix bail almost 26 hours later on May 18. The warrant was obtained at that time. The following day — May 19 — the agents "searched" petitioner's vehicle.

The Government attempts to bolster the conclusion of the court below, that Agent Kuhn merely "did not catch" the inaccurate representations in his affidavit, by attributing the drafting of the affidavit to an Assistant United States Attorney (Br. p. 6). This contention is insulting and must be given short shrift. It is common experience that such affidavits are always drafted by assistants and then given to the agents to read, verify or correct.

The Government has the audacity to contend before this Court that Colgan had told Kuhn accurate facts but the totally false description of events in the affidavit was the fault of an anonymous Assistant United States Attorney (Br. p. 7). That's really grasping for straws! The Government totally ignores the fact that Kuhn participated in the drafting, read the affidavit after it was prepared and then swore to its accuracy before a United States Magistrate. He testified:

> "Q. You knew that was false when you swore to it before the Judge, isn't that a fact? A. I knew that was not true when I swore to the affidavit."

The Government also ignores that testimony. Yet, undaunted, it argues (Br. p. 12) that Kuhn "knew" the

documents slipped out from under the "drivers seat." First, Kuhn didn't know anything; he wasn't there. Second, Colgan testified that the documents appeared from under the "passenger seat."

Finally, the Government suggests forgiveness and understanding for Agent Kuhn regarding his sworn representations because "he did not appreciate, from his *hasty* reading of the affidavit" that it was false. (Emphasis added.) The Government, however, forgets that it was 6:00 p.m. on *May 18* — a full working day after Kuhn spoke with Colgan that morning — when Kuhn swore to the accuracy of the facts. There is nothing to substantiate placing the blame on an Assistant or that Kuhn did not have sufficient time to verify the affidavit he was to swear to.

In light of all the events in this case we feel secure in contending that an intentional falsehood was uttered. At the very least there was a reckless disregard for the truth. The warrant passed judicial muster without inquiry. Again, the true picture was substantially tainted. A careful Magistrate would certainly have inquired into the fortuitous circumstances Colgan relates. In any event, petitioner was entitled to have the Court consider an accurate set of facts rather than one which was totally distorted.

The Government again errs when it argues (Br. p. 12, Fn. 11) that petitioner did not call into question the truth of Colgan's testimony. The record reveals that his testimony was inaccurate when he said there was a car in front of him. Nothing in the agent's reports indicated that, as he was pulling out from the curb, a car came by causing application of the brakes. But, since the Government raises it, why would Colgan's application of the brakes at an extremely low speed — pulling away from a curb — cause the documents to appear anymore than

petitioner's application of the brakes when he initially parked the vehicle? No one saw petitioner stuffing the documents back under the seat. Furthermore, and finally, if petitioner knew that the documents which could (and did) convict him were in the vehicle why would he call attention to his legally parked vehicle by showing anxiety about it to the agents? Why would he want to draw a crowd of agents to it by asking to sit in it or secure it? Wouldn't he think the agents would check the vehicle first?

The Government's contentions do not stand up to the facts. For the reasons set forth herein, and in the petition — in chief, it is respectfully submitted that this petition for a writ of certiorari should be granted and the judgment below reviewed.

Respectfully submitted,

MICHAEL ROSEN

SAXE, BACON
& BOLAN, P.C.
Attorneys for Petitioner